

FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA
(DIVISION 2)

Nguyen v Minister for Immigration, Citizenship and Multicultural Affairs

[2024] FedCFamC2G 380

File number(s): SYG 1607 of 2023

Judgment of: **JUDGE OBRADOVIC**

Date of judgment: 29 April 2024

Catchwords: **MIGRATION LAW** – JUDICIAL REVIEW – Partner visa – *De facto* relationship – Whether in a genuine and continuing relationship – Whether committed to a shared life – Limited period of cohabitation – Whether decision illogical and irrational – Whether decision makes unwarranted assumption – Not disclosing to spouse of criminal activity until sometime after – Whether proper consideration given – Whether significant and cogent documentary evidence taken into account – Application dismissed

Legislation: *Migration Act 1958* (Cth) s 5CB
Migration Regulations 1994 (Cth) reg 1.09A, sch 3

Cases cited: *Applicant WAEF v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 184
BOH17 v Minister for Immigration, Citizenship and Multicultural Affairs [2023] FCA 573
Djokovic v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs [2022] FCAFC 3
Minister for Immigration and Border Protection v SZRKT [2013] FCA 317
Minister for Immigration and Citizenship v Li [2013] HCA 18
Minister for Immigration and Citizenship v SZMDS [2010] HCA 16
Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane (2021) 96 ALJR 13

Division: Division 2 General Federal Law

Number of paragraphs: 50

Date of hearing: 28 February 2024

Place: Parramatta

Counsel for the Applicant: Mr Bhasin

Solicitor for the Applicant: Ray Turner Immigration Lawyers

Counsel for the Respondents: Ms Hooper

Solicitor for the
Respondents: Australian Government Solicitor

ORDERS

SYG 1607 of 2023

FEDERAL CIRCUIT AND FAMILY COURT OF AUSTRALIA (DIVISION 2)

BETWEEN: DUY TUNG NGUYEN
Applicant

AND: MINISTER FOR IMMIGRATION, CITIZENSHIP AND
MULTICULTURAL AFFAIRS
First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

ORDER MADE BY: JUDGE OBRADOVIC

DATE OF ORDER: 29 APRIL 2024

THE COURT ORDERS THAT:

1. The Amended Application for judicial review filed 7 February 2023 is dismissed.
2. The applicant pay the first respondent's costs as agreed or assessed.

Note: The form of the order is subject to the entry in the Court's records.

Note: The Court may vary or set aside a judgment or order to remedy minor typographical or grammatical errors (r 17.05(2)(g) *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth)), or to record a variation to the order pursuant to r 17.05 *Federal Circuit and Family Court of Australia (Division 2) (General Federal Law) Rules 2021* (Cth).

REASONS FOR JUDGMENT

JUDGE OBRADOVIC:

1 These are the Reasons for Judgment in respect of the application seeking judicial review of a decision of the Administrative Appeals Tribunal (“Tribunal”) dated 28 September 2023. The Tribunal’s decision affirmed the decision of a delegate of the first respondent (“delegate”) to not grant the applicant a Partner (Temporary) (Class UK) (subclass 820) visa (“820-visa”). The applicant is currently in immigration detention.

2 The applicant raises four grounds for judicial review, specifically:¹

Each of the errors identified in the grounds below were material, and amounted to jurisdictional error:

1. The Tribunal’s conclusions that it was not satisfied the parties were in a genuine and continuing relationship or were committed to a shared life as partners to the exclusion of all others lacked an evident or intelligible justification, was irrational and/or illogical because it was substantially founded on the illogical premise that a limited period of cohabitation followed by forced separation due to the applicant’s detention, in itself, supported a finding of a lack of genuineness, continuation and commitment.
2. The Tribunal’s conclusions that it was not satisfied that the parties were in a genuine committed relationship or were committed to a shared life as partners to the exclusion of all others was based on a critical assumption that was unwarranted and unsupported by evidence that a person in such a relationship would necessarily disclose their involvement in criminal activity to their partner. The conclusion was therefore legally unreasonable and/or reached with no evidence.
3. In reaching its conclusions that it was not satisfied that the parties were in a genuine committed relationship or were committed to a shared life as partners to the exclusion of all others, the Tribunal failed to give proper, genuine and realistic consideration to all of the circumstances of the relationship as required by cl 1.09A(2)(d) of the Migration Regulations by failing to give such consideration to the critical circumstances of the applicant’s detention and its impact [sic] the assessment of factors and evidence relevant [to] the relationship’s genuineness, continuation and commitment. Alternatively, the same failures meant that the conclusions reached were legally unreasonable.
4. In reaching its conclusions that it was not satisfied that the parties were in a genuine committed relationship or were committed to a shared life as partners to the exclusion of all others, the Tribunal failed to take into account significant and cogent documentary evidence, which it was required to take into account, that corroborated the applicant’s claim; namely a letter from psychologist Viet Than Tran dated 19 July 2023 and the applicant’s sponsor’s tax returns which names the applicant as her spouse.

¹ Amended Application filed 7 February 2023.

BACKGROUND

3 The applicant was born on 6 November 1988 in Vietnam. He arrived in Australia on 5 July 2013 as the holder of a Student (Subclass 573) visa, valid until 30 September 2015.

4 The sponsor, a Ms Thi Kim Huong Nguyen (“sponsor”), was born on 19 January 1992 in Vietnam. She arrived in Australia on 24 April 2013 on a Student (subclass 573) visa. The sponsor was previously married for the period from 25 January 2014 to 1 June 2019. She lodged an application for a partner visa on 30 January 2014, and was granted a permanent partner visa on 2 August 2018. On 5 November 2021, the sponsor became an Australian citizen.

5 The applicant and sponsor met on 1 January 2014 and commenced a *de facto* relationship on 1 June 2019.

6 On 23 October 2019, the applicant was remanded in criminal custody.

7 On 3 December 2020, the applicant lodged an application for both his 820-visa and for a Partner (Residence) (Class BS) (subclass 801) visa on the grounds of being in a spousal relationship with an Australian permanent resident, the sponsor. On 16 January 2021, the applicant was granted a Bridging (subclass 010) visa which ceased on 21 October 2021.

8 In or around July 2021, the applicant was detained and entered immigration detention.

9 On 16 May 2023, the delegate refused both applications for partner visas.

10 On 23 May 2023, the applicant applied to the Tribunal for review of the delegate’s decision in relation to the 820-visa.

11 On 13 July 2023, the Tribunal invited the applicant to attend a hearing on 21 July 2023. The applicant made a request to postpone the hearing which was granted on 20 July 2023.

12 On 2 August 2023, the applicant appeared before the Tribunal for hearing. On 14 August 2023, the applicant made post-hearing submissions to the Tribunal in relation to the issue raised at hearing that he did not meet the Schedule 3 of the *Migration Regulations 1994* (Cth) requirements.

13 On 28 September 2023, the Tribunal affirmed the decision of the delegate to refuse the application for an 820-visa.

DETERMINATION

- 14 The *Migration Act 1958* (Cth) defines ‘de facto partner’ as follows:²

De facto partners

- (1) For the purposes of this Act, a person is the ***de facto partner*** of another person (whether of the same sex or a different sex) if, under subsection (2), the person is in a de facto relationship with the other person.

De facto relationship

- (2) For the purposes of subsection (1), a person is in a ***de facto relationship*** with another person if they are not in a married relationship (for the purposes of section 5F) with each other but:
- (a) they have a mutual commitment to a shared life to the exclusion of all others; and
 - (b) the relationship between them is genuine and continuing; and
 - (c) they:
 - (i) live together; or
 - (ii) do not live separately and apart on a permanent basis; and
 - (d) they are not related by family (see subsection (4)).
- (3) The regulations may make provision in relation to the determination of whether one or more of the conditions in paragraphs (2)(a), (b), (c) and (d) exist. The regulations may make different provision in relation to the determination for different purposes whether one or more of those conditions exist.

...

- 15 The Regulations relevantly provide:

1.09A De facto partner and de facto relationship

- (1) For subsection 5CB(3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5CB(2)(a), (b), (c) and (d) of the Act exist.

Note 1: See regulation 2.03A for the prescribed criteria applicable to de facto partners.

Note 2: The effect of subsection 5CB(1) of the Act is that a person is the de facto partner of another person (whether of the same sex or a different sex) if the person is in a de facto relationship with the other person.

Subsection 5CB(2) sets out conditions about whether a de facto relationship exists, and subsection 5CB(3) permits the regulations to make arrangements in relation to the determination of whether 1 or more of those conditions exist.

²*Migration Act 1958* (Cth) s.5CB.

- (2) If the Minister is considering an application for:
- (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;
- the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
- (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being in a de facto relationship with each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.

- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).

Ground 1 – Illogicality and irrationality

16 The applicant asserts that:

The Tribunal’s conclusions that it was not satisfied the parties were in a genuine and continuing relationship or were committed to a shared life as partners to the exclusion of all others lacked an evident or intelligible justification, was irrational and/or illogical because it was substantially founded on the illogical premise that a limited period of cohabitation followed by forced separation due to the applicant’s detention, in itself, supported a finding of a lack of genuineness continuation and commitment.

17 The applicant submits, that there was illogical reliance on lack of cohabitation as a factor inconsistent with a genuine relationship by the Tribunal. The Minister submits that the Tribunal did not find that the limited period of cohabitation ‘without more’ meant that the criterion could not be met.

18 The legal threshold for finding that a decision-maker’s reasons are irrational or illogical is very high. The High Court has observed that:³

Whilst there may be varieties of illogicality and irrationality, a decision will not be illogical or irrational if there is room for a logical or rational person to reach the same decision on the material before the decision maker. A decision might be said to be illogical or irrational if only one conclusion is open on the evidence, and the decision maker does not come to that conclusion, or if the decision to which the decision maker came was simply not open on the evidence or if there is no logical connection between the evidence and the inferences or conclusions drawn.

19 Unreasonableness will be established where a decision-maker has come to a conclusion so unreasonable that no reasonable decision-maker could have come to such a decision.⁴

20 The process of reasoning followed by the Tribunal, which needs to be considered in light of the evidence before the Tribunal, was as set out in paragraphs [21]-[29] below.

21 The Tribunal considered the specific matters set out in reg.1.09A(3), namely the financial aspects of the relationship, the nature of the household, the social aspects of the relationship and the nature of the persons’ commitment to each other. It was alive to the fact that it had to consider all of the circumstances of the relationship.⁵

³*Minister for Immigration and Citizenship v SZMDS* [2010] HCA 16 at [135] (“SZMDS”).

⁴*Minister for Immigration and Citizenship v Li* [2013] HCA 18.

⁵ CB:633[18].

- 22 In terms of the financial aspects of the relationship,⁶ the Tribunal concluded that those aspects were not indicative of a couple in a genuine and ongoing relationship. It considered the sponsor's business, her income and expenditure, that she owns property in her name which is tenanted and that she receives the benefit of that income, that she does from time to time provide financial support to the applicant by way of regular transfers while he has been in detention, that there are no shared assets or liabilities, or any pooling of financial resources, and that the applicant demonstrated a limited knowledge of the sponsor's financial arrangements.
- 23 In terms of the nature of the household,⁷ the Tribunal noted that the parties had resided together as part of one household for a period of three and a half months, and the sharing of household responsibilities during that period. The Tribunal also noted that the parties gave consistent evidence about their plans to live together and build a life together. Limited weight was given to this aspect on the basis of the limited period of cohabitation.
- 24 In terms of the social aspects of the relationship,⁸ the Tribunal accepted that the parties represented themselves to their families as being married to each other and that their immediate family members consider them to be in a genuine and continuing relationship. The Court notes that the Tribunal accepted this notwithstanding that there was only evidence of one witness, the aunt of the sponsor who introduced the couple and who had not seen the applicant since 2019. The Tribunal was cognisant of the difficulty for the parties to obtain current evidence of them together in social situations.
- 25 In terms of the nature of the persons' commitment to each other,⁹ the Tribunal was not satisfied that the parties are in a genuine committed relationship, that they are committed to a shared life as partners to the exclusion of all others, especially given the evidence that prior to the applicant being detained, he was involved in criminal activities the sponsor had no knowledge of.¹⁰ The sponsor was not aware of the reason for the applicant's arrest and incarceration until sometime after the event. The Tribunal found it difficult to reconcile the sponsor's lack of knowledge of the criminal activities of the applicant with the relationship

⁶ CB:634[19]-[26].

⁷ CB:634[27]-[32].

⁸ CB:635[33]-[35].

⁹ CB:635-6[36]-[44].

¹⁰ This is a finding the applicant takes issue with and which is the subject of ground 2.

they claimed to be in. The Tribunal was not persuaded this was the conduct of parties in a committed relationship.¹¹ This matter is discussed further below under ground 2.

26 The Tribunal found that in the context of the parties' short period of cohabitation followed by a number of years of separation 'in forced and stressful circumstances' there was no evidence to support a finding that the parties had established a strong relationship with the potential to support them through what has no doubt been a challenging time for them. It was not a finding that the forced separation of the parties *per se* was contraindicated of a genuine and continuing relationship. It was but one of the matters which the Tribunal considered as relevant in weighing up all of the evidence before it. The Tribunal considered relevant matters in the particular context in which the parties found themselves, that is, living separately by virtue of the fact that the applicant was in detention (and previously gaol).

27 The Tribunal accepted that the sponsor provided some support to the applicant by attending the court proceedings and by visiting the applicant in detention each week, but then went on to conclude 'but in the context of the parties being together for a very short time and now separated and likely to remain so for the foreseeable future, the Tribunal had some concerns as to whether the parties were providing companionship and support to each other on an ongoing basis'. This was a finding open to it on the evidence.

28 The Tribunal found that there was insufficient evidence to find that the parties lived together in a genuine and continuing relationship or that they provide one another with companionship and emotional support. The Tribunal was not satisfied that both parties see the relationship as long-term. This was a finding open to it on the evidence.

29 The Tribunal's conclusion that the applicant and his spouse were not in a *de facto* relationship, was a conclusion which was open to it on the evidence. While different minds might differ as to that conclusion, it was not a conclusion which was not open on the evidence or which had no logical connection to the evidence. It was not a conclusion that was based on the fact of the parties' separation alone. On the probative evidence before the Tribunal, a logical or rational decision maker could have come to the same conclusion as the Tribunal.¹²

30 Ground 1 has not been made out.

¹¹ CB:635[37].

¹² SZMDS at [135].

Ground 2 – Unwarranted assumption

31 The applicant asserts that:

The Tribunal's conclusions that it was not satisfied that the parties were in a genuine committed relationship or were committed to a shared life as partners to the exclusion of all others was based on a critical assumption that was unwarranted and unsupported by evidence that a person in such a relationship would necessarily disclose their involvement in criminal activity to their partner. The conclusion was therefore legally unreasonable and/or reached with no evidence.

32 A party relying upon an unwarranted assumption to establish jurisdictional error will need to establish that the assumption is not one which a reasonable decision maker could make.¹³

33 Firstly, the Tribunal's finding was not that 'a person in such a relationship would necessarily disclose their involvement in criminal activity to their partner'. The Tribunal's finding was that the sponsor was not aware of the reasons for the applicant's arrest and incarceration until sometime after the event. It is this lack of knowledge that the Tribunal took issue with, not the sponsor's lack of knowledge of the applicant's criminal activities *per se*.

34 While it might be said that a finding that a *de facto* partner would necessarily tell his/her *de facto* spouse the detail of criminal activity they were involved in is illogical, a finding that the applicant would tell the spouse the circumstances which led to his arrest and incarceration at an earlier time than 'sometime after the event' of his arrest and incarceration, is not illogical or irrational.

35 The Tribunal found that the relationship was not characterised by a mutual commitment to a shared life together. The parties, the Tribunal found, either did not communicate as they claimed or they did not know each other as well as parties in a committed relationship would. These findings were open to it on the evidence.

36 The finding of the Tribunal concerned the level of communication or level of knowledge of *de facto* spouses, and in particular the two people in question. Such a finding was open to it, not only on the evidence, but also on the bases of common sense and a 'reasonable appreciation of human experience'.¹⁴

37 Ground 2 has not been made out.

¹³ *BOH17 v Minister for Immigration, Citizenship and Multicultural Affairs* [2023] FCA 573 at [8].

¹⁴ *Djokovic v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* [2022] FCAFC 3 at [39] citing *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Viane* (2021) 96 ALJR 13 at [17]-[21].

Ground 3 – Failure to give proper consideration

38 The applicant asserts that:

In reaching its conclusions that it was not satisfied that the parties were in a genuine committed relationship or were committed to a shared life as partners to the exclusion of all others, the Tribunal failed to give proper, genuine and realistic consideration to all of the circumstances of the relationship as required by cl 1.09A(2)(d) of the Migration Regulations by failing to give such consideration to the critical circumstances of the applicant's detention and its impact the assessment of factors and evidence relevant [to] the relationship's genuineness, continuation and commitment. Alternatively, the same failures meant that the conclusions reached were legally unreasonable.

39 The Tribunal was well aware that the applicant had been detained in gaol and immigration detention for a substantial period of the parties' relationship as claimed. It was in that context that it considered the matters it considered. In light of the applicant's detention, it grappled with, for example, the evidence of the support the sponsor provides to the applicant by visiting him in detention each week,¹⁵ and the regular transfers of money by the sponsor to the applicant during his time in detention.¹⁶ The Tribunal also considered the evidence of the social aspects of the parties' relationship in the context of the applicant's detention and the parties' difficulties in obtaining current evidence of them together in social situations.

40 The Court refers to the matters at [21]-[29] above.

41 In addition to the matters specified in reg.1.09A(3), the Tribunal considered the conduct of the parties, the applicant experiencing traumatic life events because of his actions, and the sponsor not having knowledge of the activities he was involved in.

42 On a fair reading of the Tribunal's reasons, it is clear that the Tribunal did not restrict itself to only the matters prescribed by the regulations and did give proper, genuine and realistic consideration to all of the circumstances of the relationship.

43 Ground 3 has not been made out.

Ground 4 – Failure to consider evidence

44 The applicant asserts that:

In reaching its conclusions that it was not satisfied that the parties were in a genuine committed relationship or were committed to a shared life as partners to the exclusion of all others, the Tribunal failed to take into account significant and cogent documentary evidence, which it was required to take into account, that corroborated

¹⁵ CB:635 at [39].

¹⁶ CB:634 at [24].

the applicant's claim; namely a letter from psychologist Viet Than Tran dated 19 July 2023 and the applicant's sponsor's tax returns which names the applicant as her spouse.

45 It is well established that:¹⁷

It is plainly not necessary for the Tribunal to refer to every piece of evidence and every contention made by an applicant in its written reasons... it is an administrative body and not a court and its reasons are not to be scrutinised 'with an eye keenly attuned to error'...

The inference that the Tribunal has failed to consider an issue may be drawn from its failure to expressly deal with the issue in its reasons. But that is an inference not too readily to be drawn where the reasons are otherwise comprehensive and the issue has at least been identified at some point... Where however there is an issue raised by the evidence advanced on behalf of an applicant and contentions made by the applicant and that issue, if resolved one way, would be dispositive of the Tribunal's review of the delegate's decision, a failure to deal with it in the published reasons may raise a strong inference it has been overlooked.

46 The applicant has not demonstrated that the Tribunal overlooked either the letter from the psychologist dated 19 July 2023 nor the sponsor's tax returns, nor moreover has the applicant demonstrated that such evidence was of sufficient cogency and relevant to the Tribunal's reasoning.¹⁸

47 The letter from the psychologist was expressly considered by the Tribunal at [46] of its reasons, in the context of Schedule 3 criteria. The letter was provided to the Tribunal after submissions were provided by the applicant's representative addressing why the Tribunal should waive the Schedule 3 criteria. No submissions accompanied the letter. The applicant did not notify the Tribunal as to why he considered the letter was dispositive of the issues the Tribunal needed to determine. The Tribunal was aware of the sponsor's mental health being impacted by various stresses and personal traumas.

48 In respect of the sponsor's tax returns, while there is no specific reference to them in the Tribunal's reasons, the Tribunal considered the sponsor's business' annual turnover and income, of which information is in the tax returns. The fact that the document has not been expressly referred to, does not mean it has not been considered. While the tax returns identify the applicant as the sponsor's spouse, the applicant has not demonstrated how this particular detail is of sufficient relevance in the context of the Tribunal's reasoning as a whole.

49 Ground 4 has not been made out.

¹⁷*Applicant WAEE v Minister for Immigration & Multicultural & Indigenous Affairs* [2003] FCAFC 184 at [46]-[47].

¹⁸*Minister for Immigration and Border Protection v SZRKT* [2013] FCA 317 at [112].

CONCLUSION

50 The applicant has not made out any of the grounds of judicial review. The application for judicial review is therefore dismissed.

I certify that the preceding fifty (50) numbered paragraphs are a true copy of the Reasons for Judgment of Judge Obradovic.

Associate:

Dated: 29 April 2024